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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

No. 47

ST. REGIS PAPER COMPANY,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY BRIEF OF PETITIONER ST. REGIS PAPER COMPANY

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### Statement

The Government's brief presents as the major issue on this review the question whether petitioner was bound to furnish the Federal Trade Commission (the "Commission") petitioner's retained file copies of confidential reports to the Bureau of the Census for the Census of Manufactures (Gov. Br. p. 14). This, of course, relates to question number "5" in the order granting certiorari (R. 237). On this question the Solicitor General's position is in accord with the petitioner's, i.e., that the petitioner's retained reports to the Census of Manufactures are confidential, privileged documents and that to the extent it requires the production of these documents

the judgment of the Court below should be reversed (Gov. Br. pp. 27, 46 and 49).*

In the view of the petitioner, questions number "2", "3" and "6" stated in the order allowing review (R. 237) present novel issues of wide public interest which are equally as important as question number "5".

In its brief the Government has presented a completely new question which, for the first time in this entire proceeding, raises the issue whether petitioner waived its claim of confidential privilege regarding its retained file copies of reports to the Bureau of Census (Gov. Br. pp. 8, 15, 16 and 27). In the Government's brief this additional question has been argued at length.

The additional question has been improperly raised in violation of a rule of this Court (Rule 40(1) (d) (2)), is contrary to the common law rule that questions not considered below cannot be raised in an appellate court and is founded upon an incorrect statement of the facts, as hereinafter shown.

We shall also show that the argument in the Government's brief on the claims for forfeitures is without merit.

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* This is consistent with the view of the Solicitor General's predecessor. In the petition to this Court for certiorari in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied* 364 U. S. 882 (1960), Solicitor General J. Lee Rankin did not sign the petition and in a separate statement annexed to such petition, at pages 14 and 15, stated the following:

> "The Federal Trade Commission and the Antitrust Division of the Department of Justice believe that the decision below is erroneous, raises questions of substantial importance in the enforcement of antitrust and other regulatory laws, and warrants review by this Court. On the other hand, the Bureau of the Census and the Bureau of the Budget believe that the decision below is correct and should not be reviewed by this Court. Accordingly, I am authorizing the filing of this petition for a writ of certiorari without signing it and therefore not supporting it.
>
> J. LEE RANKIN,
> Solicitor General."

## I

**The Government may not present for the first time on this review the issue whether petitioner has waived its privilege that its retained file copies of reports for the census of manufactures must be accorded confidential treatment and are not subject to the Commission's investigative process.**

This Court's Rule 40(1)(d)(2), which applies to answering briefs (Rule 40(3)), provides as follows:

> "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

The petition for writ of certiorari presented six questions. In the order granting review, this Court reduced the number of questions to four. The Government, at page 2 of its brief, undertakes to restate and reduce the questions, which, the Government's brief states, "are • • • the questions on which this Court granted certiorari" (Gov. Br. p. 2).

In addition, and making no effort to show that the exception stated in the last sentence of Rule 40(1)(d)(2) is applicable, the brief continues (Gov. Br. p. 2):

> "Another question—not raised by petitioner—is also presented. It is:
>
> Whether petitioner has waived the claim that its retained copies of the census reports are privileged."

Even if the rules of this Court do not limit the questions now presented to those raised in the petition for writ of certiorari, it appears to be settled that, in the absence of unusual circumstances compelling a contrary result, this Court will give consideration only to issues raised below.

> *United States* v. *Carignan*, 342 U. S. 36, 38 (1951);
>
> *United States* v. *Curtiss Wright Corp.*, 299 U. S. 304, 330 (1936);
>
> *Zellerbach* v. *Helvering*, 293 U. S. 172, 182 (1934);
> *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225 (1927).

In *Zellerbach Co.* v. *Helvering*, Justice Cardozo said for a unanimous court, at page 182:

> "One other contention of the Government is stated merely to exclude it from the scope of our decision. The Government makes the point that the petitioner's return, even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent and subsidiary, with that of another company, the A. S. Hopkins Company, previously dissolved. No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto. Review by this Court will be limited accordingly. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91."

The underlying reasons for this rule were stated by this Court in *Hormel* v. *Helvering*, 312 U. S. 552 (1940), as follows (at p. 556):

> "This is essential in order that parties may have opportunity to offer all the evidence they believe

> relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision thereof issues upon which they have had no opportunity to introduce evidence."

To permit new issues to be raised in a brief served a few days prior to argument and after the record has been printed and filed is not only prejudicial to petitioner by denying it the right to offer evidence relevant to the new issue, but also forecloses it from relying on facts which were in the record in the District Court, but not included in the appendix record in the Court of Appeals or the portions of the record designated in this Court.

The unfairness which would result from permitting the raising of new issues after certiorari has been granted is well demonstrated by the case at bar. The new issue is the waiver of the privilege which attaches to the petitioner's file copies of census reports. The Government claims that having voluntarily permitted inspection by Commission representatives of some reports (R. 72) and furnishing copies of other reports pursuant to a subpoena duces tecum (R. 82, 83), petitioner has opened the door to copies of all such reports "relating to the specific subject", which the Government defines as "the series of [petitioner's] corporate acquisitions which were under investigation by the Commission" (Gov. Br. p. 23).

If this issue had been raised at the trial, petitioner could have shown all of the facts with respect to the Commission's inspection of petitioner's files and the circumstances of the voluntary compliance with the subpoena duces tecum. Moreover, evidence could have been offered as to the "specific subjects" covered by the census reports which were voluntarily furnished to the Commission and the

subject matter covered by the reports which were later demanded and which petitioner refused to produce. The present record only discloses the form number of the report and the name of the mill (item 10, R. 72-73) or the corporation reporting (Exhibits 72-87, R. 82-83).

Also relevant to the question of waiver is petitioner's claim of privilege made prior to the institution of any enforcement proceedings. The Government erroneously asserts in its brief (p. 17):

> "The first time that petitioner challenged the Commission's demand for production of the retained copies on the ground that they were 'confidential and privileged' was in its answer to the complaint in the district court (R. 72), filed on October 23, 1959 (R. 58). • • •"

Evidence in the record below (which the Government overlooked) shows the Government's error. Exhibit 108 annexed to the District Court's Exhibit 1A is a letter dated August 18, 1959, from petitioner's counsel to Hon. Robert M. Parrish, the Secretary of the Commission, in which petitioner's counsel said, among other things, the following:

> "A number of the items of information requested by the Commission are of confidential nature and, in our view, the Commission cannot properly require that such information be furnished. We refer particularly to request for copies of reports for the Census of Manufactures, which have been held confidential (see *U. S.* v. *Bethlehem Steel Corporation*, 21 F. R. D. 568, SDNY 1958; *Federal Trade Commission* v. *Orton, Secretary, The Borden Company*, F. Supp. SDNY 1959; 1959 Trade Cases, Par. 69, 404).

The privilege was again asserted by petitioner in its answer in the District Court (par. 15; R. 62). The Govern-

ment made no claim at the trial or on the appeal below that petitioner had waived its privilege.

It is only in exceptional circumstances involving an obvious error that an appellate court will permit an issue to be presented which was not before the Court below. (See *Blair* v. *Oesterlein*, *supra*, at p. 225.*) Here no such circumstances have been shown. On the contrary, all the circumstances show that the general rule limiting issues on appeal and that stated in Rule 40(1) (d)(2) of this Court should apply here.

In raising the additional question of waiver on this review the Government is attempting to provide this Court a means of avoiding a decision on the difficult census question on which the Commission and Antitrust Division of the Department of Justice take a position in conflict with that of the Department of Commerce, the Bureau of the Budget and the Solicitor General. However, avoidance of this issue is neither legally well grounded nor calculated to serve the ends of justice.

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* In the opinion of Justice Stone for a unanimous Court it was said:

> "We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government. * * *"

## II

**In any event, petitioner has not waived its privilege that its retained file copies of the reports to the census of manufactures are not subject to the investigative process of the Commission.**

Even if this Court should decide that the issue of waiver is before it, the facts and the law do not support such a claim of waiver. The Government asserts that, in 1957, when petitioner and three former subsidiary corporations voluntarily furnished to the Commission file copies of reports to the Bureau of Census, petitioner waived its privilege to withhold *any* census reports, on whatever subject, which the Commission might call for during the course of its investigation of petitioner.

The furnishing of these copies of census reports would have resulted in a waiver only if they were furnished without objection in the course of an adversary proceeding or under other circumstances which either (a) evidenced petitioner's intention to abandon a known right or (b) showed that petitioner sought to obtain some advantage out of the furnishing of the documents.

> *United States* v. *Goodman*, 289 F. 2d 256 (4th Cir., 1961);
>
> *Marcello* v. *United States*, 196 F. 2d 437, 445 (5th Cir. 1952);
>
> *United States* v. *Insurance Board of Cleveland*, 1954 Trade Cases, Para. 67, 873 (ND Ohio 1954; not otherwise reported).

In *Goodman* the Court said (at p. 259):

> "The Government suggests that Goodman's disclosures to the federal agents in 1950 constituted a

> waiver of his Fifth Amendment privilege asserted in the Tax Court hearing. This argument is entirely without merit and has been repeatedly rejected by the courts. It has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding • • •".

In the case at bar, the copies of reports were furnished the Commission on a voluntary basis in an effort to cooperate with the Commission in its investigation in accordance with the Commission's rules, then in effect, which solicited such cooperation (Rules of Practice, Procedures and Organization, Sec. 1.31).

Contrary to the Government's assertion (Gov. Br. p. 9) the furnishing of the copies of the census reports to employees of the Commission does not make the reports "public". The last paragraph of Section 10 of the Federal Trade Commission Act* makes it a misdemeanor for any "officer or employee of the commission" to make public any such information unless directed by a court or the Commission. In addition the investigation being conducted by the Commission was a non-public proceeding as provided in its Rules of Practice then in effect (Sec. 1.42).

If the question of waiver had been raised in the District Court, evidence could have been offered to establish the lack of compulsion attending the production of the census reports in 1957. Fortunately, there was included in the record in the District Court (for another reason) a transcript of the so-called "subpoena" hearing the fall of 1957 (R. 74) in which the following statements were made:

> "Mr. Lamb [counsel for petitioner] • • • the investigation should be continued on a voluntary

* 38 Stat. 723 (1914); 15 U. S. C. §50 (1958). The Federal Trade Commission Act is hereinafter referred to as the "FTC Act".

> cooperative basis and without reference to a subpoena duces tecum. Our attending here today, while it coincides with the return date as fixed by the Commission for the subpeona duces tecum, is to explain our position as aforesaid and to make clear that we reserve all rights to oppose any proceedings by the Commission to enforce obedience to the subpoena duces tecum • • • ".
>
> "Mr. Seidman [Federal Trade Commission Attorney] • • • such objections as you may have have been reserved by you and should it be necessary it may be argued before the court in any proceeding brought by the Commission to enforce the subpoena or by you in behalf of St. Regis Paper Company to modify."

It was on that basis that most of the copies of census reports were furnished (R. 74), the balance having been available for inspection of documents conducted by a Commission investigator earlier in 1957 (R. 72). No waiver of privilege results from such voluntary cooperation with a government agency. But if, *arguendo*, a waiver was effected, all that was waived was the privilege with respect to the census reports actually inspected or furnished and such others as related to the same "specific subject" (*In re Associated Gas & Electric Company*, 59 F. Supp. 743 SDNY 1944).

A fatal defect in the Government's argument is its assertion that the extent of the waiver is determined by the scope of the proceeding in which the document is produced, rather than by the content of the document. Thus, instead of focusing on the documents, which petitioner and its former subsidiaries voluntarily submitted to the Commission, to determine the extent of the waiver, the Government claims that the scope of the Commission's investigation determines the area for which the privilege

has been waived. The Government argues (Gov. Br. p. 23):

> "The 'specific subject' with respect to which petitioner waived its privilege was the series of corporate acquisitions which were under investigation by the Commission."

As we have pointed out above, it is difficult, in the state of the present record, to describe with certainty the subjects covered by the census reports which were actually furnished to the Commission. But certain facts can be stated about them.

The subject matter of the census reports which had been produced was not "the series of corporate acquisitions which were under investigation by the Commission", as the Government claims (Gov. Br. p. 23). They were typical census reports containing economic data relating to the particular products manufactured by the plant or company reporting.

Although the precise nature of this economic data is not in the record in this Court, and was not introduced at the trial, because not in issue, the record does support the conclusion that the census reports which were furnished in 1957 and the census reports which the Commission's orders requested petitioner to produce concerned different subject matters.

The basic difference between the two groups is that the census reports demanded in the Commission's orders issued in 1959 are the reports of petitioner and thirteen of its former subsidiaries,* whereas the reports which were furnished in 1957 were the reports of only petitioner and four of its acquired companies (see Gov. Br. page 24). No reports have ever been submitted with respect to nine

* R. 24, 28, 32, 35, 40 and 48.

of the companies whose census reports were demanded in the Commission's orders. The reports of these nine companies which petitioner has withheld contain economic data with respect to products which are entirely different from the products manufactured by the four companies which had submitted some reports. For example, J. Neils Lumber Company, St. Paul and Tacoma Lumber Company and Northwest Door Company produced lumber and lumber products; Cupples-Hesse Corporation manufactured envelopes and tags; General Container Corporation, Ajax Box Co., Cambridge Corrugated Box Co. and F. J. Kress Company manufactured various types of boxes and containers. The companies which had furnished reports were mainly converters of various types of paper.

Thus the record on the subject establishes that the census reports demanded in the Commission's orders under review here called for copies of census reports of petitioner's divisions producing a diversity of products, none of which census reports had been furnished to the Commission in 1957.

Furthermore, the census reports furnished and the census reports requested in the Commission's orders, were for the most part, different kinds of reports.

The Census of Manufactures is conducted every four years. The reports which were furnished in 1957 were copies of reports to the Bureau of the Census for the 1954 Census of Manufactures. The reports demanded in the Commission's orders include, besides reports to the Bureau of the Census for the 1958 Census of Manufactures* (R. 51), copies of reports for the Annual Survey of Manu-

* See *Derrick* v. *St. Paul City Railway Company*, 89 N. W. 2d 629 (S. Ct. Minn. 1958).

factures for the years 1955, 1956 and 1957 (R. 28) and reports to the Bureau of the Census in connection with the "Facts for Industry Program" (R. 10).

To say that the voluntary furnishing of the reports relating to the commerce of four former subsidiaries opens the door to different kinds of reports of nine other former subsidiaries producing different lines of products during different periods, merely because they were furnished in the course of the same Commission investigation, is a long way from the holding of *In Re Associated Gas and Electric Co.*, 59 F. Supp. 743 (SDNY 1944) upon which the Government relies (see Government Brief pages 9, 18, 19, 23 and 24).

In the *Associated Gas and Electric* case the question was whether the production under a subpoena *duces tecum* of two of six letters relating to a certain corporation's participation in and knowledge of a particular proposed bond issue opened the door to the remaining four. The case holds no more than that the production, without objection, of a communication on a particular factual matter constitutes an intentional waiver of the right to claim a privilege with respect to the particular subject matter communicated. The rule was stated as follows (at p. 744):

> "• • • The petitioners having waived as to some of the letters relating to a specific subject opened the door to all the privileged correspondence between it and its attorney on that specific subject."

In *Magida* v. *Continental Can Co.*, 12 F. R. D. 74 (SD NY 1951), District Judge Kaufman of the same judicial district relied on the *Associated Gas* case and held that plaintiff, having answered questions with respect to a particular conversation with his lawyer during the course of a

pre-trial examination, had not waived his privilege as to the entire conversation. He said (at page 77):

> "• • • Defendant asserts that plaintiff effectively waived his privilege as to all conversations with his attorney because he volunteered certain portions of those conversations. I disagree. I see no intent to reveal the whole breadth of discussions in plaintiff's admitting, as he did, in a general way, that certain conversations took place. I do believe that plaintiff waived his privilege as to those immediate exchanges with counsel and I have so indicated by allowing those questions which concern themselves with those conversations. (#1 and #20 of plaintiff's examination.) Beyond that I will not breach the privilege."

Similarly in *In re Prudence-Bonds Corporation*, 76 F. Supp. 643, 647 (EDNY 1948) the production of one opinion letter by a corporate trustee involving a particular transaction did not open the door to the "several hundred" other opinions which its counsel had rendered to it. See also *Hashagen* v. *United States*, 283 F. 2d 345 (9th Cir. 1960).

Although we do not believe this Court should reach the question, we submit that if it does, upon all of the facts and the applicable rules this Court must hold that petitioner did not waive its privilege to withhold from the Federal Trade Commission its confidential retained copies of census reports.

## III

**The Government's arguments to sustain the imposition of forfeitures are without merit.**

The Government's excursion outside of the issues properly before this Court should not divert attention from the main issue presented, whether petitioner, recipient of a substantially invalid agency investigative order, may

be held liable for penalties for non-compliance because it awaits a Government action in the nature of mandamus, in order to obtain a judicial declaration that portions of the order are defective.

In the case at bar, petitioner's administrative remedies had been exhausted. Failing in its efforts to have the Commission revise its demands (R. 166, 168-170, 193, 197), petitioner was presented with the option of complying with the defective orders or having the matter decided by a district court, either by commencing an action for a declaratory judgment or by awaiting mandamus proceedings to enforce the orders. It chose the latter.*

The Government suggests here, as it did in the Court of Appeals below, that the petitioner's only defense to the action was that the Commission lacked statutory authority to make the orders (Gov. Br. 52-53). This is not true. Petitioner asserted two kinds of objections, specific and general. Petitioner attacked specific questions contained in the orders on the grounds of privilege, vagueness and duplication. Most of the trial in the District Court was devoted to the consideration of these objections (See "Plaintiff's Specifications of Default and Defendants' Comments on Specifications of Default", lodged with this Court, see Gov. Br. p. 80). Petitioner was sustained on practically all of these objections except the objection regarding copies of census reports, which is one of the questions before this Court (R. 237).

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* That petitioner failed to initiate review proceedings and obtain a stay is of no consequence since the District Court found its objections to the Commission's questions well-founded (R. 210-212).

The Government attempts to justify the imposition of penalties on the ground that petitioner also refused to furnish answers on a general ground which the District Court did not sustain. However, since no revision of the questions was possible, petitioner had to await judicial proceedings (initiated by petitioner or by the Government) in order to assert its specific objections which were upheld. The Government characterizes the case (Gov. Br. p. 53) as:

> "• • • one in which a litigant's failure to comply with an order results not from any honest mistake of judgment as to what is required, or from excusable error in a good faith attempt to comply, but from the decision to contest the authority of the tribunal."

Petitioner's refusal to comply with the Commission's original, defective orders was not a "mistake" or "error". It was done in a good faith effort to clarify a poorly drafted agency investigative order which effort succeeded in large measure. (See District Court's opinion R. 212.)

The Government takes issue as to the extent of the invalidity of the Commission's orders. However, whether one-third or two-thirds of the questions were defective, the fact is that the orders were so substantially invalid that the District Court could not grant the relief in the nature of mandamus, as provided in Section 9 of the Federal Trade Commission Act, which the Government had requested. Petitioner respectfully submits that penalties under the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act are inappropriate where the Commission's order has been found to be so defective and improper that the District Court could not grant "mandamus" (Section 9), as demanded in count

one of the Government's complaint. Obviously, in the belief that the District Court's determination of count one would not be improved in the Court of Appeals, the Government did not appeal from that part of the judgment of the District Court which drastically modified the Commission's original requests (R. 217).

The Government apparently agrees that the precise extent of the invalidity is not important, but for a different reason. According to the Government, petitioner should be penalized irrespective of the extent of the invalidity of the Commission's orders, so long as any of the questions contained therein were upheld. The Government says (Gov. Br. p. 58):

> "Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement of the orders affected its liability therefor".

The facts of the case under review force the Government to the extreme position quoted above.*

Finally, in an effort to answer Point II of petitioner's main brief, the Government, at page 68 of its brief, refers to the legislative history of Section 10 of the Federal Trade Commission Act and attempts to read the third unnumbered paragraph of Section 10 so that the words "special report" include "answers in writing to specific questions" with the result that a failure to furnish "answers in writing to specific questions" would be punish-

* If, despite our arguments, this Court sustains the imposition of penalties, we respectfully point out that no penalties should be assessed from the date of the entry of the judgment of the District Court (April 21, 1960, R. 213-216) for the reason that since such date there has been no "failure" to furnish reports within the meaning of the third (unnumbered) paragraph of Section 10 of the F.T.C. Act. Since the entry of the District Court's judgment, petitioner has either furnished the information required to be furnished or has been excused from furnishing information by a court stay. Petitioner will support this view in further detail upon the issuance of this Court's mandate, if necessary.

able in the same manner as the failure to file a "special report". That, we submit, is an incorrect reading of the clear language of the statute.

In Section 6(b) of the Federal Trade Commission Act* Congress distinguished between "special reports" and "answers in writing to specific questions" and conferred upon the Commission the power to require both. The omission to include "answers in writing to specific questions" in the third (unnumbered) paragraph of Section 10 clearly left the failure to furnish such answers to be punished only as provided in the first paragraph of Section 10 which specifies a maximum fine of $5,000 and imprisonment for not more than one year for refusal to "answer any lawful inquiry".

The legislative history shows only that the requirement for "answers in writing to specific questions" was added to the original provisions of the proposed Act empowering the Commission to require annual and special reports from corporations, but without adding any language to the third paragraph of Section 10 providing for forfeitures for failure or refusal to furnish an annual or special report, and thus does not show a Congressional intent to make the forfeiture provisions applicable to requests for answers in writing to specific questions. The language of the statute is clear. The third paragraph of Section 10 does not provide any forfeiture for failure to furnish "answers in writing to specific questions" required by Section 6(b).

It is well established that when statutory wording is clear, it is controlling, and resort to legislative history will not be permitted to show an entirely different meaning and intent (*Ex Parte Collett*, 337 U. S. 55, 61 (1949); *Packard Motor Car Co.* v. *Labor Board*, 330 U. S. 485,

* 38 Stat. 721 (1914), 15 U. S. C. Section 46(b) (1958).

492 (1947); *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199 (1915)). The Government's request to have this Court add a new and additional forfeiture provision should be rejected as improper.

For the reasons stated, the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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